BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA IN THE FURTHER INQUIRY INTO CERRTAIN ISSUES IN THE UNIVERSAL SERVICE-INTERCARRRIER COMPENSATION TRANSFORMATION PROCEEDING

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August 24, 2011

I. INTRODUCTION

The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these comments in response to the Federal Communications Commission's (FCC or Commission) *Further Inquiry in the Universal Service –Intercarrier Compensation Transformation Proceeding* (*Further Inquiry*), which the FCC released on August 3, 2011.[1] Our comments will focus on the role of the state under the "America's Broadband Connectivity Plan" (*ABC Plan*) submitted to the FCC by six Price Cap Companies.[2]

Specifically, the CPUC opposes the broad preemption of state authority proposed in the *ABC Plan*. The *ABC Plan* would preempt or otherwise seriously undermine state authority in the following several critical respects: 1) authority to set intrastate access rates, 2) authority to impose carrier-of-last-resort (COLR) obligations, and 3) authority to independently condition carrier eligibility to receive federal Universal Service Fund support. In the *ABC Plan*, the proponents also ask the FCC to "conclude that [Voice over Internet Protocol] VoIP services are interstate services, and reaffirm that broadband services are interstate services,"…and also to "preempt any state regulation of those services that is inconsistent with the federal policy of nonregulation."[3] In the *Further Inquiry*, under the subheading, "*State Role"*, it appears the FCC may be proposing to

[1] *Further Inquiry into Certain Issues In the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket No. 01-92, 96-45; GN Docket No. 09-51, rel. August 3, 2011 (*Further Inquiry*).

[2] *See* Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC, WC Docket No. 10-90 et al. (filed July 29, 2011) (*ABC Plan*).

[3] See *ABC Plan*, Attachment 1, Framework of the Proposal, p. 13.

adopt the *ABC Plan*'s state role proposals. The FCC states: "State Members [of the Federal – State Joint Board on Universal Service] and other commenters propose an ongoing role for states in monitoring and oversight over recipients of universal service support. We seek comment on specific illustrative areas where the states could work in partnership with the Commission in advancing universal service, subject to a uniform national framework…."[4] The possibility that the FCC would consider consolidating so much existing state regulation under its umbrella is troubling for a variety of reasons, as the CPUC discusses below.

In summary, removing state authority over intrastate access charges, over COLR obligations, and most importantly, over universal service funding eligibility is a recipe for completely disconnecting local oversight of vital telecommunications services from the ratepayers who use these services and depend on them daily. The eventual outcome of this bad policy proposal, if adopted, could well be the complete gutting of universal service, as it has been embodied in FCC and CPUC precedent, and in federal and state statutes. In the world envisioned by the *ABC Plan*, only the FCC, thousands of miles from California consumers, would stand between the customer and the complete loss of service because a carrier decides it no longer wants to serve communities it deems economically unviable. As NASUCA notes in its comments, "all public service obligations associated with being a telephone company would vanish for the telephone

[4] *Further Inquiry* at p. 5, footnote omitted.

companies serving the vast majority of Americans".[5] In this vein, California observes that the ultimate goal of the *ABC Plan* could be the extinction of a Public Telephone Network as it has served the public for generations. This is not the world the FCC contemplated in the National Broadband Plan.

II. DISCUSSION

A. CPUC Opposes State Preemption Recommendations In *ABC Plan*

The CPUC is mindful that reform of the current intercarrier compensation high-cost support schemes is necessary to meet the needs of the evolving marketplace and facilitate an expeditious transition to an all IP-world, given the shift from traditional wireline services to broadband and wireless (and wireless broadband). The CPUC also recognizes that this reformation process is and has been a difficult endeavor. At the same time, California is of the view that all interested parties must be open to compromise in order to meet these goals. And, we support the Commission's effort to adopt a solution before the end of the year. However, the CPUC does not agree that it is necessary to preempt or eliminate the states' critical role over intrastate telecommunications services and new intrastate voice services in order to cross the goal line. Nor do we believe that the FCC even possesses authority to preempt state jurisdiction over intrastate rates, COLR obligations, or eligible telecommunications carrier requirements.

[5] Initial Comments of the National Association of State Utility Consumer Advocates (NASUCA), p. 8. The CPUC was able to review a draft of the NASUCA comments, and notes that page references to those comments may not be exact.

1. Intrastate Access Charges

The proponents of the *ABC Plan* seek to preempt state authority over intrastate access charges. To achieve this result, the *Plan* proposes intercarrier compensation reform via a multi-year transition that will result in one unified default terminating rate of $0.0007 per minute for all traffic routed to or from the PSTN, regardless of provider or technology. On July 1, 2013, each carrier would reduce its reciprocal compensation rate and intrastate terminating access rates for transport and switching to parity with the carrier's intrastate access rate. The *Plan* also proposes a cap on originating access.

The *Plan*'s proponents state that the Commission can rely on its rulemaking authority under Section 251(b)(5)[6] of the Communications Act of 1934, as amended (Act), to adopt a uniform default rate for all traffic routed to or from the PSTN:

> The Commission has previously stated that the compensation regime in section 251(b)(5) includes the transport and termination of *all* "telecommunications" involving at least one LEC and makes no distinctions based on jurisdiction or type of service. All traffic currently subject to either tariffed access charges or reciprocal compensation charges falls within section 251(b)(5), because it necessarily involves a LEC on at least one end. With respect to that traffic, the Supreme Court has made clear that the Commission "has jurisdiction to design a pricing methodology" to implement section 251(b)(5) and the related pricing standards in section 252(d). *AT&T Corp. v.Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999). Using that authority, the Commission may establish a pricing methodology that includes a uniform default rate for all traffic subject to section 251(b)(5).[7]

[6] 47 U.S.C.251(b)(5).

[7] *ABC Plan*, Attachment 5, Legal Authority White Paper, pp.1-2.

The *Plan* proponents further assert that the FCC can rely on Section 251(b)(5), along with authority under Section 251(g)[8] of the Act, to cap originating access and other intercarrier compensation rates.[9]

Finally the *Plan* proposes the following source of authority:

> [T]he Commission can rely on sections 201 and 223 to assert authority over all traffic on the PSTN, including traffic currently subject to state-law intercarrier compensation regimes. Specifically, the Commission may rely on the "impossibility," or "inseverability," doctrine to extend its authority under sections 201 and 332 to all traffic routed to or from the PSTN — including Voice-over-Internet Protocol ("VoIP") traffic, which the Commission can conclude is all interstate for jurisdictional purposes — by adopting rules that preempt, prospectively, state intercarrier compensation rules that differ from the uniform federal regime, whether with respect to originating or terminating traffic.
>
> Indeed, the Commission can rely on dramatic marketplace and technological changes in recent years to find that *all* traffic routed to or from the PSTN — whether TDM, wireless, or VoIP — is now inseverable.[10]…
>
> Moreover, the Commission can find that the continued application of state intercarrier compensation rules that differ from the uniform federal regime would pose a direct obstacle to the accomplishment of federal policy.[11]

The CPUC opposes FCC preemption of state jurisdiction over intrastate access rates and reciprocal compensation. To begin, § 152 (b) of the Act prohibits FCC regulation of intrastate rates and services, a fact that the proponents of the *ABC Plan* conveniently ignore.[12] Furthermore, the argument that traffic is no longer severable is

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[8] 47 U.S.C. 251(g)

[9] *ABC Plan*, Attachment 5, Legal Authority White Paper, p. 2.

[10] *Id.*

[11] Id., p. 3.

[12] 47 U.S.C. 152 (b) reads in part "Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-***A*** of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges,

simply not correct. The CPUC has supported past FCC proposals to move towards a unified rate for terminating access and transport over a transition period, including the proposal to lower intrastate access rates to the interstate terminating access rate as a transitional step. We also understand that meeting this goal is essential to reforming the intercarrier compensation regime. Notwithstanding that position, the CPUC has not supported and does not now urge the FCC to meet this goal by preempting state jurisdiction over intrastate rates.[13] Instead, we recommend that the FCC establish incentives to encourage the states to join in the plan. For instance, the Commission could order that no state will receive federal funding for broadband deployment or operation from the proposed Connect America Fund (CAF) until the State has ordered its local exchange carriers to adopt a new uniform intercarrier compensation regime once the FCC has established that regime.

2. Carrier-of-Last-Resort and ETC Obligations

The *ABC Plan* proposes that the Commission preempt state jurisdiction over imposition of both COLR and ETC obligations.

> Lastly, the Commission has authority to eliminate outdated service obligations such as those imposed under the Commission's eligible-telecommunications-carrier ("ETC") regulations or other carrier-of-last-resort ("COLR") rules. Going forward, state or federal service obligations

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classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier…."

13 *See* Comments Of The California Public Utilities Commission And The People Of The State Of California In the Matter of Connect America Fund, WC Docket 10-90; A National Broadband Plan for Our Future, GN Docket 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket 07-135; High-Cost Universal Service Support, WC Docket 05-337; Developing an Unified Intercarrier Compensation Regime, CC Docket 01-92; Federal-State Joint Board on Universal Service, CC Docket 96-45; Lifeline and Link-Up, WC Docket 03-109*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking,* rel. Feb. 9, 2011.

must apply only to funded carriers in those areas where they receive explicit support — regardless of those carriers' legacy regulatory status. Current federal ETC obligations, however, require designated carriers to provide supported services throughout their service areas, *regardless* of whether they are receiving high-cost support for those services. Similarly, some states have COLR obligations that require incumbent LECs to provide service in a given area, sometimes at reduced rates. In today's dynamic marketplace, these regulations are not only unnecessary but actually *undermine* Congress's and the Commission's universal service goals by locking consumers into legacy technologies and deterring carriers from deploying broadband and IP-enabled services. Existing ETC and COLR regulations, where they apply, inefficiently skew the market and make it difficult (or even impossible) for carriers to upgrade from legacy architecture, thus diverting capital that could be used for broadband deployment. Those rules — which generally apply only to incumbent LECs — also effectively impose unfunded mandates and are inconsistent with a technologically neutral, procurement-model approach to universal service, in which the Commission would make explicit agreements with providers to serve a specific area that otherwise would not be served for a specific period of time in return for a specific amount of universal service funding." [14]

a) COLR Obligations

ABC Plan proponents offer the following rationale for their position that the FCC should preempt legacy service obligations:

> While many states that had COLR obligations have either eliminated or scaled them back, other states have not. The Commission can encourage states to transform their legacy service obligations so that they promote, rather than frustrate, the Commission's universal service goals. For the states that refuse to undertake such reforms or that fail to provide explicit universal service support that fully compensates carriers that have elected to continue satisfying the state's service obligations, the Commission can preempt legacy service obligations as inconsistent with federal policy. The Commission can rely on two, mutually reinforcing sources of authority for such preemption.

[14] *ABC Plan*, Attachment 5, Legal Authority White Paper, pp. 6-7.

> *First*, the Commission can conclude that state legacy service obligations negate the Commission's policy of ensuring that broadband is deployed throughout the nation. ….
>
> *Second*, the Commission has authority under section 254(f) to preempt state legacy service obligations that are "inconsistent" with the Commission's rules, that "burden" federal universal service mechanisms, or that are not "equitable and nondiscriminatory." 47 U.S.C. § 254(f). State legacy service obligations satisfy each of these criteria for preemption. [15]

California strongly opposes the *ABC Plan* proposal to preempt state carrier of last resort jurisdiction and we oppose addressing this matter in this proceeding. First, we note that California has very definitely *not* "eliminated or scaled…back" COLR obligations. Rather, the CPUC has extended COLR status to Cox Communications, at the company's request. In addition, it is completely unclear what state actions regarding COLR obligations have "frustrated" the FCC's universal service goals. Nor does the *Plan* specify what state legacy service obligations are "inconsistent" with FCC rules. Indeed, the depth and breadth of the flawed approach in the *ABC Plan*'s sweeping condemnation of state "legacy service obligations" is too far reaching to address here. If the FCC intends to seriously consider pre-empting state regulation of COLR obligations, the FCC should devote a proceeding specifically to that undertaking.

Federal and state COLR obligations are necessary to promote and ensure provision of universal service, which is a long-standing federal and California policy. Federal and state universal service mandates have been fundamental to federal telecommunications policy at least since 1934. California initiated its universal service policies first through Commission precedent, and ultimately, the California Legislature enacted the Moore

[15] *Id.,* pp. 7-8.

Universal Telephone Service Act in 1987, codifying the CPUC's universal service policies.[16]

Congress has mandated that all Americans be provided with essential communications services. Section 254 of the Act requires that policies for the preservation and advancement of universal service must be based on the following principles, among others, 1) that "quality services should be available at just, reasonable, and affordable rates"; 2) that "access to advanced telecommunications and information services should be provided in all regions of the Nation"; and 3) that "consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas. Carrier-of-Last-Resort obligations are key tools necessary to meet these universal service goals. And states are best positioned to ensure that these tools are used effectively so that universal service goals are met.

Furthermore, the FCC cannot preempt state COLR obligations unless it first makes a determination that such obligations are inconsistent with FCC rules to preserve and advance universal service.[17] Such a determination would have to be preceded by a thorough review of all state *COLR* obligations and the particulars of each. The *ABC*

[16] *See* California Public Utilities Code § 871 *et seq*.

[17] 47 U.S.C. 254 (f) provides that "a State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."

Plan does not provide for such review but instead asks the FCC to gut completely COLR obligations for all carriers except for those carriers receiving CAF support, and then only in areas where the support applies and only for as long as the subsidy is provided.

Although we recognize that the issue of COLR obligations must be reassessed and perhaps modified in light of the dramatic changes in the communications markets and in governmental policies governing those markets, this proceeding is not the proper procedural vehicle for addressing this vital issue. Whether and how these fundamental obligations should be modified should only be determined after thorough proceedings at both the federal and state levels focusing on these issues.

b) Eligible Telecommunications Carrier (ETC) Obligations

The *ABC Plan* proponents state that the FCC has authority to eliminate ETC obligations and urges the Commission to do so.

> The Commission plainly has authority to reform legacy ETC obligations. When it eliminates the existing high-cost universal service programs, the Commission can simultaneously eliminate any ETC obligations that require carriers to provide legacy services. On a going forward basis, the Commission also has authority under section 214 to ensure that any mandatory service obligations apply *only* when an ETC actually receives high-cost support for a given geographic area. It is already the case today that carriers receive no federal high-cost funding in some areas, and legacy ETC obligations for those carriers in those areas should be eliminated immediately upon adoption of the Framework.[18]

Here again, the proponents of the *ABC Plan* are ignoring statute. Congress clearly gave states the authority to grant ETC status to carriers operating within the state. Section 214(e) (2) of the Communications Act of 1934, as amended, provides as follows:

(2) Designation of eligible telecommunications carriers

[18] *ABC Plan*, Attachment 5, Legal Authority White Paper, p. 7.

> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.[19]

Similar to state COLR obligations, service conditions that states establish for ETC designees help meet the goals of universal service and are tailored to the needs of the particular state. California has granted a number of ETC designations, first for wireline providers and in the past year, for a number of wireless providers. In this respect, the CPUC is responding to changes in the marketplace by approving ETC status for non-"legacy" service providers. Each state has its own unique characteristics and these types of service obligations are best determined at the state level.

c) VoIP and Broadband Services

The *ABC Plan* asks the Commission to declare that Voice over Internet Protocol Services are interstate, thus preempting state regulation of an essential service -- voice communications. The *Plan* proponents also ask the FCC to preempt any state regulation of broadband services.

[19] 47 U.S.C. 214 (e) (2).

> The transition from POTS to IP-based broadband networks that serve all Americans will require hundreds of billions of dollars of private sector investment. To encourage that investment, the Commission must follow a policy of nonregulation of broadband and other information services, which permits those services "to flourish in an environment of free give-and-take of the marketplace." [Footnote omitted] The Commission must conclude that VoIP services are interstate services, and reaffirm that broadband services are interstate services. The Commission must also preempt any state regulation of those services that is inconsistent with the federal policy of nonregulation.[20]

California strongly opposes any FCC action on these issues in this proceeding. The FCC has a pending proceeding considering the question of whether and to what extent states may exercise jurisdiction over broadband services -- *In the Matter of IP-Enabled Services*, NPRM, WC Dkt. No. 04-36, FCC 04-28, rel. March 10, 2004. These important matters need to be addressed, but not in this proceeding. It is imperative that the FCC reform intercarrier compensation and the high cost support schemes as soon as possible. Throwing the issue of broadband regulation into the mix here would only further delay a resolution of these essential policy questions.

Furthermore, the determination of what is the proper role of state government in an IP communications world is a complex issue that should only be addressed after a thorough vetting of this question in a proceeding in which all interested parties have an opportunity to fully participate. Finally, California notes that the FCC, to our knowledge, does not have a stated policy of "nonregulation" of broadband. We are not familiar with any decision in which the FCC has expressly stated that broadband services should not be

[20] *ABC Plan*, Attachment 1, Framework of the Proposal, p. 13.

regulated at all.[21] Indeed, the FCC has extended to broadband service providers a number of requirements historically imposed on providers of POTS. For example, VoIP providers must collect and remit universal service surcharges and must provide 911 services to their customers.[22] Imposition of these requirements is hardly consistent with a policy of "nonregulation".

III. CONCLUSION

California urges the Commission to quickly adopt a plan to begin the transition away from the current intercarrier compensation and high cost support schemes to solutions that support and encourage the transition to IP services. However, we oppose preemption of state authority over intrastate rates, and state COLR and ETC obligations. We also strongly disagree with the *ABC Plan* proponents that this is the proper proceeding in which to address federal/state regulatory roles over IP services. We urge the FCC to reject the state preemption proposed in the *ABC Plan*.

[21] It is unclear exactly what "broadband services" the *ABC Plan* is referencing in this passage.

[22] For other common carrier obligations that the Commission has extended to interconnected VoIP see ET Docket No. 04-295, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14989 (2005) (assistance for law enforcement); *IP-Enabled Services,* WC Docket No. 04-36, Report and Order, 22 FCC Rcd 11275 (2007) (disability access); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007) (customer privacy); *Telephone Number Requirements for IP-Enabled Services Providers,* WC Docket No. 07-243, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) (local number portability and numbering administration); *IP-Enabled Services,* WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 (2009) (discontinuance notifications).

Respectfully submitted,

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